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Shah Rehan bin Abdul Rahman v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–202–08 OF 2013
BALIA YUSOF, AZIAH ALI AND ROHANA YUSUF JJCA
5 FEBRUARY 2015

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused person convicted and sentenced for trafficking in dangerous drugs — Dangerous Drugs Act 1952 — Accused person arrested during ambush by police — Defence of no knowledge — Whether probable — Whether possession of drugs proven — Whether defence sufficiently considered — Whether conviction and sentence safe

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The appellant was charged for trafficking in 1,952g of cannabis, an offence under Dangerous Drugs Act 1952 ('the DDA'). Acting on information received, a team of police officers had carried out an observation by a roadside. The appellant was seen walking out from a road junction holding a white plastic bag in his right hand. He was arrested, and upon a search conducted, the white plastic bag was seized. Upon inspecting the bag, the police found two envelopes each containing a slab wrapped with transparent plastic, suspected to be drugs. The appellant tried to run away upon being confronted by the police team but was successfully arrested. At the same time, some other police personnel raided a house located about 30–50 metres from the place where the appellant was arrested and three other males were arrested. One of them was Abdul Maungni. The appellant's defence was that he received a phone call from his friend named Baby Majidee who asked the appellant to accompany him to Johor Bahru for the purpose of buying a car. Baby Majidee came to fetch him and he sat on the front passenger seat of Baby Majidee's car. Along the way, Baby Majidee stopped his car in front of a shop and asked the appellant to go to Abdul Maungni's house to take some money. The appellant went to Abdul Maungni's house and there, he saw Shasha whom he knew about six month before the arrest. Shasha gave the appellant one plastic bag containing two envelopes and said to the appellant that those envelopes contain the money. The appellant was walking back towards Baby Majidee's car when he was suddenly confronted by the police. The appellant denied any knowledge of the drugs. The appellant's defence was that of an innocent carrier. At the end of the trial, the appellant was found guilty, convicted and sentenced to death by the High Court. Hence, the present appeal. The grounds of appeal were no actual possession; and the failure of the judge to consider the defence sufficiently.

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Held, allowing the appeal and setting aside the conviction and sentence:

(1) The appellant had possession of the impugned drugs. It would be recalled that three other persons were named by the appellant in his defence, namely Baby Majidee, Shasha and Abdul Maungni. The existence of these three persons was also not only revealed during the defence case but was brought up as early as when SP1 was called to give evidence. It was not true that these three names only surfaced when SP6, the investigating officer, gave evidence. The *Alcontara* notice was duly given to the prosecution at the earliest stage of the case. The appellant's version of the roles of Baby Majidee and Shasha was also put to this witness at this stage (see paras 11 & 14).

(2) The three named persons were not fictitious characters. Three others were arrested at a house nearby at about the same time when the appellant was arrested. One of them was Abdul Maungni and he was arrested in respect of 'kes ganja'. Later, Shasha was also arrested and charged under s 39B of the DDA. And SP1, the leader of the arresting party, confirmed that he received two different information which led to the arrest of the appellant and Abdul Maungni's home being targeted as part of his mission on that day. Being too preoccupied and under the erroneous belief that the appellant is duty bound to prove his case, the trial judge had failed and had totally dismissed the appellant's explanation. The trial judge had committed a serious error of law (see para 24).

[Bahasa Malaysia summary

Perayu dituduh mengedar dadah kanabis sebanyak 1,952g, kesalahan di bawah Akta Dadah Berbahaya 1952 ('ADB'). Bertindak atas maklumat yang diterima, sepasukan pegawai polis telah menjalankan pemerhatian di tepi jalan. Perayu dilihat berjalan keluar daripada jalan persimpangan memegang beg plastik berwarna putih dalam tangan kanannya. Dia ditangkap, dan atas pemeriksaan yang dijalankan, beg plastik berwarna putih tersebut dirampas. Selepas memeriksa beg tersebut, polis mendapati dua sampul surat setiap satu mengandungi ketulan mampat yang dibungkus dengan plastik lutsinar, disyaki adalah dadah. Perayu cuba melarikan diri selepas didatangi oleh pasukan polis tetapi berjaya ditangkap. Pada masa yang sama, beberapa pegawai polis yang lain menyerbu rumah yang terletak lebih kurang 30–50 meter daripada tempat di mana perayu ditangkap dan tiga lelaki lain ditangkap. Salah seorang daripada mereka adalah Abdul Maungni. Pembelaan perayu adalah bahawa dia menerima panggilan telefon daripada kawannya bernama Baby Majidee yang meminta perayu menemaninya ke Johor Bahru bagi tujuan membeli kereta. Baby Majidee datang mengambilnya dan dia duduk di kerusi hadapan penumpang kereta Baby Majidee. Semasa perjalanan, Baby Majidee memberhentikan keretanya di hadapan kedai dan meminta perayu pergi ke rumah Abdul Maungni untuk mengambil wang. Perayu pergi ke rumah Abdul Maungni dan di situ, dia nampak Shasha yang dikenalinya lebih kurang enam bulan sebelum tangkapan tersebut. Shasha memberi perayu satu beg plastik

mengandungi dua sampul surat dan berkata kepada perayu bahawa sampul surat tersebut mengandungi wang. Perayu berjalan kaki balik ke arah kereta Baby Majidee apabila dia didatangi dengan tiba-tiba oleh polis. Perayu menafikan apa-apa pengetahuan mengenai dadah tersebut. Pembelaan perayu adalah sebagai pembawa tidak bersalah. Pada akhir perbicaraan, perayu didapati bersalah, disabitkan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi. Maka, rayuan ini. Alasan rayuan adalah tiada milikan sebenar; dan kegagalan hakim untuk mempertimbangkan pembelaan secara mencukupi.

Diputuskan, membenarkan rayuan dan mengetepikan sabitan dan hukuman:

(1) Perayu mempunyai milikan dadah yang dipersoalkan tersebut. Ia akan menarik balik bahawa tiga orang lain yang dinamakan oleh perayu dalam pembelaannya, iaitu Baby Majidee, Shasha dan Abdul Maungni. Kewujudan ketiga-tiga orang ini bukan sahaja didedahkan semasa kes pembelaan tetapi dibangkitkan seawal apabila SP1 dipanggil untuk memberi keterangan. Adalah tidak benar bahawa ketiga-tiga nama hanya berbangkit apabila SP6, pegawai penyiasat, memberi keterangan. Notis *Alcontara* diberikan dengan wajar kepada pihak pendakwaan pada peringkat awal kes. Versi perayu mengenai peranan Baby Majidee dan Shasha juga dikemukakan kepada saksi ini pada peringkat ini (lihat perenggan 11 & 14).

(2) Ketiga-tiga orang yang dinamakan bukan karakter rekaan. Ketiga-tiga mereka ditangkap di rumah berdekatan pada masa yang sama apabila perayu ditangkap. Salah seorang daripada mereka adalah Abdul Maungni dan dia ditangkap berkaitan 'kes ganja'. Kemudiannya, Shasha juga ditangkap dan dituduh di bawah s 39B ADB. Dan SP1, ketua pasukan penangkapan, mengesahkan bahawa dia menerima dua maklumat berlainan yang membawa kepada penangkapan perayu dan rumah Abdul Maungni disasarkan sebagai sebahagian misinya pada hari tersebut. Terlalu asyik dan di bawah kepercayaan yang salah bahawa perayu adalah wajib untuk membuktikan kesnya, hakim perbicaraan telah gagal dan menolak keseluruhan penjelasan perayu. Hakim perbicaraan telah melakukan kesilapan undang-undang yang serius (lihat perenggan 24).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Cases referred to

Abu Bakar bin Alif v R [1953] 1 MLJ 19 (refd)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Choo Chang Teik & Anor v PP [1991] 3 MLJ 423, SC (refd)
DA Duncan v PP [1980] 2 MLJ 195; [1980] 1 LNS 12, FC (refd)
Goh Ah Yew v PP [1949] 1 MLJ 150 (refd)

Illian & Anor v PP [1988] 1 MLJ 421, SC (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 1 CLJ (Rep) 311, SC (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705 ; [2000] 4 CLJ 649, HC (refd)
PP v Datuk Haji Harun bin Haji Idris & Ors [1977] 1 MLJ 180 (refd)
PP v Tan Gong Wai & Anor [1985] 1 MLJ 355 (refd)
Rosenizam bin Maharam v PP [2003] 5 MLJ 49, HC (refd)
Tan Foo Su v PP [1967] 2 MLJ 19 (refd)

Legislation referred to

Dangerous Drugs Act 1952 s 39B
Evidence Act 1950 s 114(g)

Appeal from: Criminal Trial No 45A-18 of 2012 (High Court, Johor Bahru)

Md Zahar bin Ngah (Zahar & Partners) for the appellant.
Nurshafini bt Mustapha (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Balia Yusof JCA:

[1] The appellant was charged for an offence of trafficking in 1,952g of cannabis, a dangerous drug under the Dangerous Drugs Act 1952 ('the DDA'). He was found guilty, convicted and sentenced to death by the High Court at Johor Bahru. This is his appeal against the said conviction and sentence.

THE PROSECUTION'S CASE

[2] Acting on information received, a team of police officers from the Narcotics Department of IPK Johor carried out an observation at the roadside in Kg Melayu Pandan, Johor Bahru, Johor. The appellant was seen walking out from a road junction holding a white plastic bag in his right hand. He was arrested, and upon a search conducted, the white plastic bag was seized. Upon inspecting the bag, the police found two envelopes each containing a slab wrapped with transparent plastic, suspected to be drugs.

[3] As part of the prosecution's case, 'SP1', the leader of the team, stated that the appellant tried to run away upon being confronted by the police team and he had to be brought to the ground to effect the arrest. At the same time, some other police personnel raided a house located about 30–50 metres from the place where the appellant was arrested and three other males were arrested. One of them was Abdul Maungni. SP1 however, was not sure that the appellant was arrested as he was coming out of the said house.

THE DEFENCE'S CASE

[4] On 22 March 2012 at about 5.45pm, the appellant received a phone call from his friend named Baby Majidee who asked the appellant to accompany him to Johor Bahru for the purpose of buying a car. Baby Majidee came to fetch him and he sat on the front passenger seat of Baby Majidee's car. Along the way, Baby Majidee stopped his car in front of a shop and asked the appellant to go to Abdul Maungni's house to take some money.

[5] The appellant went to Abdul Maungni's house and there, he saw Shasha whom he knew about six month before the arrest. Shasha gave the appellant one plastic bag containing two envelopes and said to the appellant that those envelopes contain the money. Thereafter, the appellant walked back towards Baby Majidee's car. Suddenly he was confronted by three men and was pushed to the ground. Later, he realised they were policemen and he became scared upon being told that the plastic bag contains drugs. At that time, Baby Majidee was nowhere to be seen.

[6] The appellant denies any knowledge about the drugs found in the plastic bag which he thought was money as told by Baby Majidee and Shasha earlier. In essence, the appellant's defence is that of an innocent carrier.

THE APPEAL

[7] In the appeal before us, learned counsel advanced two grounds namely:

(a) no actual possession; and

(b) the failure of the learned judge to consider the defence sufficiently.

[8] On the issue of possession, the argument of learned counsel is quite simplistic, in that, without knowledge, there can be no possession. The appellant is an innocent carrier. He does not know what was in his possession. To him, it was money as told to him by Baby Majidee earlier and subsequently told by Shasha that the plastic bag contains money for Baby Majidee.

[9] In his findings on possession, the learned judge had found that the appellant had actual possession. At p 16 of the appeal record, His Lordship stated:

> Berasaskan kedudukan tersebut, juga jelas menunjukkan yang OKT di dalam kes ini mempunyai pemilikan secara langsung (actual possession) terhadap dadah tersebut iaitu sebelum dan semasa dia di tahan.

[10] Earlier, the learned judge had considered the fact that the appellant put up a struggle and he had to be brought to the ground before the police could arrest him. Concluding his findings on the issue of possession, the element of knowledge was dealt with in the following words at p 17 of the appeal record …:

> Dari aspek pengetahuan pula, untuk menghubungkan OKT sebagai mempunyai pengetahuan terhadap dadah Cannabis yang dijumpai itu, apa yang dihujahkan oleh pihak Pendakwaan, ada meritnya bila mana dihujahkan bahawa OKT mempunyai pengetahuan tentang kewujudan dadah Cannabis tersebut. (Reaksi OKT yang dikatakan melawan dan berlaku pergelutan ketika dadah tersebut ditemui oleh SP1 Pegawai Serbuan, jelas menunjukkan bahawa OKT mengetahui akan terdapatnya dadah di dalam ekshibit P7A itu. Reaksi OKT tersebut adalah konsisten dengan kewujudan dadah yang dijumpai di dalam P7A.

[11] We agree with the findings made by the learned judge. The appellant had possession of the impugned drugs.

[12] Upon his consideration of the defence, the learned judge had found that the appellant's defence 'sukar untuk diterima', 'tiada mempunyai asas yang kukuh' and 'tiada pembuktian yang konkrit ditampilkan' (see p 25 of the appeal record).

[13] The learned judge found that it was just impossible to believe that the appellant only knew the content of the envelope in the plastic bag to be drugs upon being told by the police after his arrest. In His Lordship's view, that defence is a bare denial and bare denial can never be a good defence (*DA Duncan v Public Prosecutor* [1980] 2 MLJ 195; [1980] 1 LNS 12, *Rosenizam bin Maharam v Public Prosecutor* [2003] 5 MLJ 49).

[14] It would be recalled that three other persons were named by the appellant in his defence, namely: Baby Majidee, Shasha and Abdul Maungni. The existence of these three persons was also not only revealed during the defence case but was brought up as early as when SP1 was called to give evidence. It is not true as submitted by the learned deputy that these three names only surfaced when SP6, the investigating officer, gave evidence. The *Alcontara* notice was duly given to the prosecution at the earliest stage of the case. The appellant's version of the roles of Baby Majidee and Shasha was also put to this witness at this stage.

[15] While under cross-examination, SP1 confirmed that the appellant was arrested about 30–50 metres away from the house where three others were also arrested in relation to drug offences. One of them was Abdul Maungni who was arrested in respect of 'kes ganja'.

[16] During re-examination by the learned deputy public prosecutor, SP1 also testified that Abdul Maungni's house was also targeted arising from the two different information he received.

[17] SP6, the investigating officer, confirmed that Shasha was also later arrested and charged under s 39B of the DDA involving the drug cannabis.

[18] In addressing his mind to the defence, the learned judge said at p 29 of the appeal record:

> Semasa di dalam pembelaannya, OKT telah menyebutkan nama-nama Abdul Maungni, Shasha dan Baby Majidee dengan peranan-peranan tertentu dikatakan dimainkan oleh penama-penama tersebut. Namun, nama dan peranan mereka ini hanya disebut begitu sahaja. Mereka tidak ditampilkan sebagai saksi pembelaan
>
> ...
>
> Jelaslah, jika mereka ini dikatakan dapat memberikan keterangan demi mengukuhkan lagi Pembelaan OKT, maka keperluan untuk mengemukakan mereka ke Mahkamah ini adalah sangat vital (*Baharom v Public Prosecutor* [1960] 1 MLJ 249). Lantas kegagalan untuk mengemukakan ketiga-tiga penama ini menyebabkan anggapan di bawah Seksyen 114(g) Akta Keterangan 1950 terpakai.

[19] There are two aspects of the learned judge's consideration of the defence that merits our comment. Firstly, judges must again be reminded not to delve in the 'believable and convincing' test in applying the 'reasonable doubt' test. It is trite that an accused person need only raise a reasonable doubt. This was the reminder given by the Supreme Court in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 1 CLJ (Rep) 311. The learned judge in the instant appeal found the appellant's defence story to be unbelievable and unconvincing. While it is not wrong for His Lordship to conclude that the defence story is unbelievable/false and unconvincing, it is still incumbent on his part to consider whether the defence nevertheless has raised a reasonable doubt.

[20] Secondly, it is a well-established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to cast a reasonable doubt in the prosecution's case (per Mohamed Azmi SCJ in *Mohamad Radhi bin Yaakob v Public Prosecutor* at p 172 (MLJ); at p 315 (CLJ)).

[21] While it is perfectly proper that a judge may view with suspicion or disbelieve the defence story, he is still bound to consider the defence however

weak, and to acquit only if he is not satisfied that the prosecution had discharged the burden of proof which rests upon it.

[22] It is trite law that the explanation given by an accused has to be considered together with the rest of the evidence in the case and that he will be entitled to an acquittal if as a result of such explanation the existence of a material fact on which the prosecution relied is no longer so probable as to make a prudent man act upon the supposition that the fact exists (per Augustine Paul J (as he then was) in *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705 at p 737; [2000] 4 CLJ 649 at p 683).

[23] We are of the considered view that had the learned trial judge properly and sufficiently considered the explanation of the appellant in his defence and consider it together with the rest of all the evidence available, the probability of the defence story could not just be brushed aside.

[24] The three named persons are not fictitious characters. Three others were arrested at a house nearby at about the same time when the appellant was arrested. One of them was Abdul Maungni and he was arrested in respect of 'kes ganja'. Later, Shasha was also arrested and charged under s 39B of the DDA. And SP1, the leader of the arresting party, confirmed that he received two different information which led to the arrest of the appellant and Abdul Maungni's home being targeted as part of his mission on that day. Being too preoccupied and under the erroneous belief that the appellant is duty bound to prove his case, the learned trial judge had failed and had totally dismissed the appellant's explanation. The learned judge had committed a serious error of law.

[25] Generally, in a criminal trial, there is no burden cast on the accused to call witnesses and no adverse inference may be drawn on the failure of the defence to call witnesses (*Goh Ah Yew v Public Prosecutor* [1949] 1 MLJ 150, *Abu Bakar bin Alif v R* [1953] 1 MLJ 19, *Public Prosecutor v Tan Gong Wai & Anor* [1985] 1 MLJ 355, *Illian & Anor v Public Prosecutor* [1988] 1 MLJ 421, *Tan Foo Su v Public Prosecutor* [1967] 2 MLJ 19). The learned trial judge in the instant appeal had erred in invoking the s 114(g) provision on the failure of the appellant to call the three named persons. On that ground alone, we ought to allow the appeal. There was a clear misdirection by the learned trial judge.

[26] Eusoffee Abdool Cader J (as he then was) in *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180 among others had commented:

> ... No unfavourable inference can or will be drawn against the accused for not calling these or any other witnesses and I make no adverse inference or assumption whatsoever against them in this respect. I do not think however that I am necessarily

precluded from commenting on or taking into consideration the failure to call particular witness or witnesses in weighing the credibility of the evidence adduced by and for the defence and in viewing the whole of the material upon which I have to decide in order to determine whether the explanation of the accused has cast a reasonable doubt on the case for the prosecution. I must repeat however and make it abundantly clear that in a criminal case there is no obligation on the defence to call any witness and it is entirely open to the defence to adduce no evidence at all, and all that they need to do is to raise a reasonable doubt when called upon to enter on their defence, though the failure to call any particular witness may be a matter the court can take into account (without however drawing any adverse inference or making any assumption or presumption whatsoever against the defence in that regard), particularly as in this case the potential witnesses were persons in respect of whom the prosecution had probably no cogent means of knowing that they might have any relevant evidence to give until the accused themselves and their witnesses came to give evidence (*Regina v Gallagher* [1974] 1 WLR 1204; *Public Prosecutor v Lim Kuan Hock* [1967] 2 MLJ 114 at p 115; *Tay Choo Wah v Public Prosecutor* [1976] 2 MLJ 95 at p 100.

[27] The learned deputy public prosecutor in her submissions in reply had referred to the case of *Choo Chang Teik & Anor v Public Prosecutor* [1991] 3 MLJ 423 in support of her contention that adverse inference may be drawn against the appellant for his failure to call witnesses in support of his defence.

[28] We agree that the said general principle is not without exception and the said case of *Choo Chang Teik & Anor v Public Prosecutor* referred to by the learned deputy is a clear illustration. We shall now revert to that case. In his defence, the first appellant in the said case stated that he had been beaten by thugs at his friend's house which left him disabled for two years. They have injured his waist. He also produced a certificate of his membership of a handicapped persons' association to prove his contention. The first appellant had failed to call his witness to testify that he had been attacked by thugs two years before as a reason for him running away from the scene when the police party raided the house. The learned judge had drawn an adverse inference against him under s 114(g) of the Evidence Act 1950 and this was affirmed by the Supreme Court. The prosecution had taken particular issue on the contention of the first appellant that he had been beaten by thugs two years ago. Evidence in rebuttal was introduced by the prosecution showing that the first appellant had told some police officers that he had a fall in his cell which caused his injury.

[29] The distinction which can be drawn in that case is that upon rebuttal evidence being adduced by the prosecution, the onus shift to the first appellant to prove his contention by calling his friend at whose house he was beaten. On his failure to do so, the natural conclusion and inference is that, the proof, if produced, instead of rebutting would sustain the charge, thus attracting the

adverse presumption. On that distinction, we found the authority referred to by the learned deputy to be inapplicable to the facts and circumstances of the instant appeal.

[30] For the aforesaid reason, we allowed the appeal and set aside the conviction and sentence. The appellant is acquitted and discharged.

Appeal allowed and conviction and sentence set aside.

Reported by Afiq Mohamad Noor